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OCT 1 1959
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IN THE

Supreme Court of the United States

October Term, 1959.
No. 281

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,
Petitioner,

vs.

SOUTHERN CALIFORNIA GAS COMPANY, a corporation, and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, a corporation,
Respondents.

On Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division One.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION.

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION.

Opening Statement.

The Los Angeles County Flood Control District, petitioner for a writ of certiorari, hereby replies to the brief of respondents in opposition.

In our petition we argued that a federal question was presented because Section 16 of the Los Angeles County Flood Control Act (petition, App. C, p. 23) empowered the petitioner district to require the respondents to relocate their pipe line, provided that "* * * just compensation therefor first be made, in the manner and to the extent required by the Constitution of the United States and the Constitution of California," and that the Dis-

trict Court of Appeal necessarily held that compensation was required by the Constitution of the United States. We rely, therefore, on that portion of paragraph (3) of Section 1257 of Title 26 of the Unietd States Code which provides, in part:

> "1257. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> "* * *
> "(3) By writ of certiorari * * * where any title [or] right * * * is specially set up or claimed under the Constitution * * * of * * * the United States."

Respondents claimed the right of reimbursement was given to them by the Fourteenth Amendment of the Constitution of the United States. Therefore a right was claimed under the Constitution of the United States. Paragraph (c) does not limit the right of review to cases where the right was claimed by the petitioner.

Respondents contend:

1. It must appear that the party bringing the case up for review intended to assert a federal right. (Brief of Respondents, p. 8.)

2. The decision of the District Court of Appeal was based upon an adequate non-federal ground. (Brief of Respondents, pages 6, 7, 9, 11.)

3. The Decision of the District Court of Appeal is correct. (Brief of Respondents, pp. 13-20.)

4. There is no important question of Federal law. (Brief of Respondents, pp. 20, 21.)

Avoiding, as far as possible, repetition of what we said in anticipation of these objections in our petition, we answer them in the order stated.

I.

The Power to Review Under (3) of Section 1257 May Be Exercised as Well Where the Federal Claim Is Sustained as Where It Is Denied.

At page 8 respondents say:

> "The petitioner has failed to cite a single federal right that was claimed by it and denied. * * *
>
> "It has been held that before the Supreme Court has jurisdiction to re-examine the final judgment of a state court, the averments must be clear and positive so as to place it beyond question *that the party bringing the case up for review* intended to assert a federal right." (Italics are respondents.)

Respondents cite five cases, the latest of which was decided in 1900. This rule was changed on December 23, 1914, by the enactment of 38 Statutes at Large, page 790, chapter 2. See the history of this statute by Justice Frankfurter and Mr. James M. Landis, in "The Business of the Supreme Court" (1927) pages 190-198.

Paragraph (2) of Section 1257 permits review by appeal:

> "* * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and *the decision is in favor of its validity.*" (Italics added.)

The omission of language similar to that italicized from paragraph (3) shows that under that paragraph it makes no difference whether the federal right was denied or sustained.

As recently as *Northwestern States Cement Co. v. Minnesota*, 358 U. S. 450, this Court granted certiorari and

reversed the judgment of the Supreme Court of Georgia which court had held a state statute unconstitutional as repugnant to the federal constitution.

Numerous other cases where this Court reviewed the judgments of state courts where the state courts held state statutes repugnant to the federal constitution are cited in footnote 6, page 32 of Wolfson & Kurland (*sub-nominee,* Robertson & Kirkham) Jurisdiction of the Supreme Court of the United States.

In *Barrows v. Jackson,* 112 Cal. App. 2d 534, 247 P. 2d 99, the District Court of Appeal of California sustained a "* * * right * * * specially set up or claimed under the Constitution * * * of * * * the United States," in refusing to grant a judgment for damages for the violation of a racial restrictive covenant. This Court granted certiorari, 345 U. S. 902. (Judgment was affirmed, 346 U. S. 249.)

Petitioner does not claim any right under the Constitution of the United States but respondents did, which right was sustained by the District Court of Appeal. It is to review that decision that we seek certiorari.

II.

The Decision of the District Court of Appeal Could Not Have Been Based Upon an Adequate Non-Federal Ground.

Respondents' contention to the contrary was anticipated and answered at pages 19-24 of our petition.

At page 8 of its brief Respondents seem to assume that we rely upon Section 13 of Article I of the State Constitution (Appendix C of our petition, p. 13). We did not do so, but anticipated that respondents might. Our argument on pages 19-22 was in anticipation that respond-

ents might argue that the judgment below was based on this provision. Since, at page 8 of their brief, the respondents assure us that neither they nor the District Court of Appeal relied on this section it can be dismissed from consideration. Respondents say (page 11) that the decision of the District Court of Appeal was based upon Section 14 of Article I of the California Constitution. (Appendix C of petition, pp. 13-15.)

As shown on pages 17 and 18 of our petition, the District Court of Appeal, itself, quoted language from both *Bauer v. County of Ventura*, 45 Cal. 2d 276 at 282, 289 P. 2d 1 at 5; and *San Gabriel Valley Country Club v. County of Los Angeles*, 182 Cal. 392 at 406, 188 Pac. 554 at 559, 560, 9 A. L. R. 1200 at 1210 (Appendix A of petition, pp. 6, 8, Appendix B of brief of respondents, pp. 9, 11) showing that Section 14 itself does not create a property right. Section 14 could not apply unless, independently of the provisions of that section, some other provision of either the California Constitution or the Constitution of the United States required that compensation be paid. Since respondents have assured us that the only provision of the California Constitution relied upon by the District Court of Appeal was Section 14 of Article I, necessarily it must have held that the payment of compensation was required by some provision of the Constitution of the United States.

In this case the respondents cited and relied upon the Fourteenth Amendment to the Constitution of the United States. [Clk. Tr. p. 5, lines 26-28; pp. 4, 25, and 31 of Respondent's Brief in District Court of Appeal, and p. 2 of Answer to Petition for Hearing.] The District Court of Appeal could not award a judgment to the respondents without deciding that the Fourteenth Amend-

ment required payment of compensation. In California the case could be cited as precedent under the doctrine of *stare decisis* as holding that the Fourteenth Amendment required the payment of compensation even though this amendment was not mentioned in the opinion. (*American River Flood Control District v. Sweet*, 214 Cal. 778, 782, 783, 7 P. 2d 1030 at 1032.

When a State Court necessarily denies or upholds a claimed right under the Constitution of the United States, it cannot deprive this Court of jurisdiction by omitting all mention of the United States Constitution in its opinion.

In *Schlemmer v. Buffalo, Rochester & Pittsburgh Railway Company*, 205 U. S. 1, Mr. Justice Holmes said, at page 11:

> "* * * if the question is duly raised and the judgment necessarily, or, by what appears, in fact involves such a decision, then this Court will take jurisdiction, although the opinion below says nothing about it. *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254. * * *."

In the cited case, Mr. Justice Brown said, at page 269:

> "* * * This court has had frequent occasion to hold that it is not always necessary that the federal question should appear affirmatively on the record, *or in the opinion*, if an adjudication of such question were necessarily involved in the disposition of the case by the state court. * * *." (Italics added.)

This rule was followed in *Williams v. Kaiser*, 323 U. S. 471 at 478; and *Dorchy v. Kansas*, 272 U. S. 306 at 309.

III.

The Judgment of the District Court of Appeal Is Contrary to a Decision of This Court.

At page 13 of their brief in opposition, the respondents say:

> "The Decisions of the Courts Below are Clearly Correct."

Respondents' reference to Section 14 of Article I of the California Constitution already has been answered.

At pages 14 and 15, respondents cite *Northern Natural Gas Co. v. Blue Earth County*, 233 Minn. 274, 47 N. W. 2d 106. As appears at page 111 (of 47 N. W. 2d) the Court there relied upon a statute which the court construed as requiring the payment of compensation, even though, in the absence of such a statute, compensation would not be due. The statute was construed so as to have the same effect as the Marin County Flood Control and Water Conservation Act which is noted in *Los Angeles County Flood Control Dist. v. Southern California Edison Co.*, 51 Cal. 2d 331 at 337, 333 P. 2d 1 at 4, the Court saying that the Act:

> "'* * * provides that the district shall 'in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal, reconstruction or relocation of any structure, railways, mains, pipes, conduits, wires, cable, poles, of any public utility which is required to be moved to a new location . . .' (Stats. 1953, Ch. 666, p. 1915, 1919; West, Water Code—Appendix, Secs. 68-5 (13); 1 Deering's Wat. Code, Act 4599, subd. 13.) * * *."

The California Court then pointed out that, in contrast to the Marin Act, the Los Angeles County Flood Control

Act did not require payment by the District for the relocation of utility facilities, unless required by the Constitution..

In *Northern Natural Gas Co. v. Blue Earth County, supra,* the Court (47 N. W. 2d at 111) cited with approval its former decision, *Chicago, M. & St. P. Ry. Co. v. Sprague,* 140 Minn. 1, 167 N. W. 124; and *Chicago B. & Q. Ry. Co. v. State of Illinois ex rel. Drainage Com's,* 200 U. S. 561, both of which held that the public utility must move its facilities at its own expense if such relocation was necessitated by the improvement of a natural watercourse.

The only reported case which we have found, and the only one cited by respondents consistent with the decision of the District Court of Appeal is *Cities Service Gas Co. v. Riverside Drainage District,* 137 Kan. 410, 20 P. 2d 520.

In that case the court neither cited nor discussed *Chicago B. & Q. Ry. Co. v. State of Illinois ex rel. Drainage Com'rs, supra,* or the cases cited at page 14 of our opening brief.

Even if, despite these considerations, the case were of any value as an interpretation of state law, as to the federal question involved it is directly contrary to the decision of this Court in *Chicago, B. & Q. Ry. Co. v. State of Illinois ex rel. Drainage Com'rs, supra.*

At page 26 of our petition we have anticipated and answered the argument which the respondents make at pages 17 and 18 of their brief in opposition that *Chicago, B. & Q. Ry. Company v. State of Illinois ex rel. Drainage Com'rs, supra,* 200 U. S. 561 is not in point. The fact that in that case, review was sought from a decision

denying the constitutional right, no longer is a valid distinction, since this Court has the jurisdiction to review where the State court decides in favor of the federal right as well as where it denies it.

The fact, as noted by respondents at the bottom of page 19 of their brief, that the petitioner agreed to pay the railroad for the cost of its relocation is immaterial. The respondents themselves at page 4 of their brief in opposition point out that the District purchased an easement from the railway and:

> "* * * as consideration for said easement, promised to reimburse the Railway for any and all costs and expenses incurred in connection with changes required because of the construction of the said storm drain."

We do not concede, of course, that if the District pays an unfounded claim which it does not owe to one person it must pay the claim of every other person based on the same theory, but, here, the record does not show that the District conceded that a claim similar to that of the respondents was valid.

IV.

There Is an Important Question of Federal Law.

That the question of federal law involved is important we believe we have demonstrated at pages 7-11 of our petition. That the question is not of mere local importance in the State of California is shown by the fact that the same question appears in the reported cases of:

Illinois: *People v. Peeler*, 125 N. E. 306; *Dittmer v. Ill. Terminal R. Co.*, 287 Ill. 513, 123 N. E. 37.

Iowa: *Mason etc. v. Board, etc., Wright County*, 144 Iowa 10, 121 N. W. 39; *Chicago R. v Drainage Dist. No. 5*, 121 N. W. 193.

Kansas: *Cities Service Gas Co. v. Riverside Drainage District, supra*, 137 Kan. 410, 20 P. 2d 520.

Minnesota: *Chicago, M. & St. P. Ry. Co. v. Sprague, supra*, 140 Minn. 1, 167 N. W. 124.

Tennessee: *Nashville, etc. v. Middle etc.* 261 S. W. 975.

The fact that, in reported opinions, the appellate courts of two states (California, in this case, and Kansas in *Cities Service Gas Co. v. Riverside Drainage District, supra,*) have ignored the decision of this Court and held contrary thereto, necessitates that the law as laid down by this Court in *Chicago, B. & Q. Ry. Co. v. State of Illinois ex rel. Drainage Com'rs. supra*, 200 U. S. 561 be definitely and unequivocally reaffirmed.

Respectfully submitted,

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